



# Freedom of Expression in the United States



Demonstrators on opposite sides of the abortion debate protest in front of the U.S. Supreme Court. In the United States, uninhibited public debate creates an intellectual marketplace where ideas compete with other freely expressed ideas. © AP Photo/Gerald Herbert

The Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR), to which the United States is a party, both state that individuals have a right to freedom of expression; this right includes the freedom to seek, receive and impart information and ideas of all kinds.

The United States safeguards this right through the First Amendment to the U.S. Constitution, which provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging

the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

The U.S. Constitution protects even the most offensive and controversial speech from government suppression, and permits regulation of speech only under certain limited and narrow circumstances. The U.S. system is built on the idea that the free and open exchange of ideas encourages understanding, advances truth-seeking and allows for the rebuttal of falsehoods. The United States believes, and experience has shown, that the best

way to counter offensive speech is not with regulation but with more speech.

## The Foundation of Free Expression

The U.S. Constitution's protection of freedom of expression embodies the notion that an individual's ability to express himself freely—without fear of government punishment—produces the autonomy and liberty that promote better governance. Allowing citizens to openly discuss topics of public concern results in a more transparent and representative government, more tolerant ideas, and a more stable society.

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History has shown that curtailing free expression by banning speech does not advance democracy. The drafters of the U.S. Constitution recognized that when governments forbid citizens from talking about certain topics, it often forces those citizens to discuss such topics secretly. By allowing individuals to express their opinions — no matter how much the government and other citizens may disagree with them — the First Amendment promotes transparency and social stability. This uninhibited public debate also forces ideas into the intellectual marketplace, where they must compete with the ideas freely expressed by other individuals.<sup>1</sup> This competition of ideas means that inferior or offensive ideas give way to better ones.

### Narrowly Drawn Exceptions

While the First Amendment provides very broad protections for expression in the United States, freedom of speech is not absolute. Generally, the government has more discretion to impose content-neutral restrictions than content-based restrictions.

### CONTENT-NEUTRAL RESTRICTIONS

The government can generally place time, place, and manner restrictions on the exercise of freedom of expression, provided that the restrictions are not based on the content of the speech or the viewpoint of the speaker. These restrictions must 1) be content neutral, 2) be narrowly tailored to serve a significant government interest, and 3) leave open other channels of communication.<sup>2</sup>

For example, the government may impose reasonable regulations on the volume of loudspeakers used in a downtown business district, impose reasonable limits on protests in residential neighborhoods in the middle of the night, or require permits for parades and organized protests to ensure that they do not create public safety hazards, provided that such restrictions apply to all speakers without regard to the particular content or viewpoint of the speech.

<sup>1</sup> See *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50 (citing *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)).

<sup>2</sup> *Perry Educ. Ass'n v. Perry Educators' Ass'n*, 460 U.S. 37, 45 (1983).



Students protest state budget cuts for higher education outside the governor's office. The U.S. government can apply time, place and manner restrictions on speech so long as those restrictions do not limit the content of that expression. © AP Photo/Matt Rourke

### CONTENT-BASED RESTRICTIONS

While content-based restrictions are generally impermissible, there are some narrow exceptions. Special categories of expression that may be restricted under the First Amendment include incitement to imminent violence, true threats, defamatory speech, and obscenity.

#### Incitement to Imminent Violence

An individual's speech may be restricted if 1) it is intended to incite or produce lawless action, 2) it is likely to incite such action, and 3) such action is likely to occur imminently. This is a very high standard, which courts have rarely found to have been met. General advocacy of violence, such as writing on a website that violent revolution is the only cure to society's problems, does not constitute incitement to imminent violence.

For example, in 1969, a Ku Klux Klan member delivered a speech in Ohio in which he advocated "revengence" (sic) against Jews and African Americans.<sup>3</sup> The U.S. Supreme Court struck down a statute prohibiting his speech because it criminalized speech that was not "directed at inciting or producing imminent lawless action" and was not "likely to incite or produce such action."<sup>4</sup>

<sup>3</sup> *Brandenburg v. Ohio*, 395 U.S. 444, 446 (1969).

<sup>4</sup> *Id.* at 447.

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A Klansman listens to a leader's speech against illegal immigration while hundreds of demonstrators hold signs in protest of the Ku Klux Klan rally. © AP Photo/News-Courier, Kim Rynders, left and © AP Photo/The Decatur Daily, Jonathan Palmer, right

Similarly, if a person burns a U.S. flag at a protest against the U.S. government's immigration policies, and a counter-protester becomes upset and physically attacks someone who appears to be an immigrant, the flag burner's expression likely would be protected by the First Amendment because it was not intended to incite violence.

In contrast, if a speaker belonging to a particular ethnic group calls on an angry mob to imminently and specifically physically attack someone of a different ethnic group to prove his group's superiority, and someone from that mob immediately physically attacks someone from that different ethnic group, the speaker's speech likely would not be protected by the First Amendment because it was intended to incite imminent violence and was likely to incite such violence.

### True Threats

Speech may also be restricted based on its content if it falls within the narrow class of "true threats" of violence. A true threat is a statement that a reasonable recipient would take to mean that the speaker, or people working with the speaker, intend to commit physical harm against the recipient. For example, a Philadelphia woman was sentenced to eight months confinement after she left an anonymous threatening note on her colleague's chair.

### Defamation

In the United States, defamatory speech is a false statement of fact that damages a person's character, fame or reputation. It must be a false statement of fact; statements of opinion, however insulting they may be, cannot be defamation under U.S. law.

Under U.S. defamation law, there are different standards for public officials and private individuals. Speakers are afforded greater protection when they comment about a public official, as opposed to a private citizen. In 1964, the U.S. Supreme Court ruled that public officials could prove defamation only if they could demonstrate "actual malice," that is, that the speaker acted with knowledge that the defamatory statement was false or "with reckless disregard of whether it was false or not."<sup>5</sup>

This decision was later extended to cover "public figures," in addition to public officials.<sup>6</sup> For the private concerns of private individuals, though, the standard for proving defamation remains lower.<sup>7</sup> Defamation of private individuals can be established if the statements were false and damaged the person's reputation without showing actual malice. Only individuals, not groups, can be defamed.

<sup>5</sup> New York Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964).

<sup>6</sup> Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

<sup>7</sup> Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985) (plurality opinion).

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Demonstrators for and against same-sex marriage express their opposing viewpoints. The United States believes the most effective weapon in combating hate speech is tolerant, truthful and intelligent counter-speech. © AP Photo/Toby Talbot

Even where courts find defamation, they do not impose criminal punishment. Instead, courts may require the speaker to publish a correction to the defamatory statement and/or to financially compensate the victim.

### Obscenity

Obscenity may be restricted under the First Amendment, but there has been a long debate over what constitutes obscenity and how it should be regulated. The U.S. Supreme Court defined obscenity in 1973 as expression that the average person, applying contemporary community standards, would find 1) appeals to prurient interests, 2) depicts or describes sexual conduct in a patently offensive way, and 3) lacks serious literary,

artistic, political or scientific value, when taken as a whole.<sup>8</sup>

A court evaluates each element independently and will not classify expression as obscene unless all factors exist. For example, if a book uses coarse language and depicts sexual conduct but, taken as a whole, does not appeal to prurient interests or has literary value, it is not obscene.<sup>9</sup> Given such high standards, it is rare for the courts to find expression obscene.

### Hate Speech

Hate speech — generally defined as speech that maligns a person or group based on race, ethnicity,

8 *Miller v. California*, 413 U.S. 15 (1973).

9 See *United States v. One Book Called "Ulysses"*, 5 F. Supp. 182 (S.D.N.Y. 1933).

gender, religion, sexual orientation or disability — receives full First Amendment protection. Speech that is intended to incite imminent violence or credibly threaten individuals, however, can be restricted as outlined above.

While the United States does not restrict hate speech, it understands that the most effective weapon in combating hate speech is not suppression, but tolerant, truthful, and intelligent counter speech.

Banning intolerant or offensive speech can be counter-productive, raising the profile of the offensive speech and causing hateful ideologies to fester in dangerous, sometimes hidden ways. Persuasion — not regulation — is the solution.

The United States' strong constitutional protections for and belief in freedom of expression do not mean that it sits idly by as individuals and groups seek to spread toxic expressions of hatred. Rather, the United States deploys an array of policies to reach out to affected communities, provide conflict resolution services, and enhance dialogue.

### GOVERNMENT VERSUS PRIVATE ACTION

The First Amendment protects citizens from government restrictions on free expression. It is inapplicable to situations in which a private party restricts another's speech. A private employer, for example, may forbid its employees from sharing the company's trade secrets. Still, those employees enjoy First Amendment protections with respect to government action.

